KERAJAAN MALAYSIA

v.

VEN-COAL RESOURCES SDN BHD

HIGH COURT MALAYA, IPOH
LEE SWEE SENG JC
[SUIT NO: 21NCVC-40-2011]
30 DECEMBER 2013

CONTRACT: *Building contract - Breach - Termination - Delay caused by late handing over of site possession and change in piling requirement - Refusal of extension of time - Whether delay amount to repudiation - Whether liquidated damages reasonable remedy - Whether there was failure to mitigate loss by granting extension of time*

CONTRACT: *Building contract - Construction - Delay - Extension of time - Delay caused by late handing over of site possession and change in piling requirement - Whether extension of time unreasonably refused - Whether concurrent works involved - Whether there was failure to prove delay*

CONTRACT: *Breach - Damages - Mitigation of damages - Duty to mitigate loss - Building contract wrongly terminated for delay - Whether extension of time unreasonably refused - New contractors appointed at higher costs - Whether there was failure to mitigate loss by granting extension of time*

CONTRACT: *Breach - Termination - Wrongful termination - Building contract wrongly terminated for delay - Whether delay proven - Termination before expiry of contract period - Whether liquidated damages reasonable remedy - Whether there was failure to mitigate loss by granting extension of time*

The plaintiff awarded the defendant a contract to construct two blocks of building for a school ('the project'). The completion date was 26 October 2009. Site possession was given to the defendant on 10 June 2008. Later, a three months extension was given to the defendant without any request made for it ('the first EOT'). The extension was given as a matter of course and across the board to all Bumiputra contractors during that time to alleviate their problems due to shortage of and rise in the costs of building materials. That extended the completion date to 25 January 2010.

The project involved the construction of a temporary building to house the pupils whilst the existing building was demolished and rebuilt. The temporary building was ready on 13 October 2008 but the headmaster refused to move until a store was built. The store was not in the plan and as such, could only be built after the plaintiff submitted the drawings to the defendant on 15 December 2008 ('the first variation order'). The store was completed in January 2009 and the pupils moved to the temporary building in early February 2009. This caused a three months delay. After demolition, piling work to a depth of 36 metres commenced but failed the load test. Fresh instruction for piling to a depth of 48 meters came only on 8 April 2009. The additional 144 piles had to be specially ordered by the defendant. The additional piling work could only be completed on 4 June 2009 ('the second variation order'). That was because after piling to the new depth, one month had to be allowed for settlement before any load test could be conducted. The new piling depth withstood the load test. The defendant requested for extension of time ('EOT') of 189 days based on the two unforeseen events, *ie*, the construction of the store and the piling to a new depth of 48 meters, but received no response from the plaintiff. Meanwhile, the defendant continued with the construction of the project. However, the plaintiff, comparing the status of the project with the Critical Path Method ('CPM') submitted by the defendant before the commencement of the project, proceeded to terminate the contract by a notice of termination dated 16 October 2009 on ground that the defendant had breached cl. 19(ii) of the contract in that it had failed to proceed regularly and diligently with the works. At the time of the termination of the contract, the defendant had constructed the two blocks up to the roof beam and still had three and a half months to go before the completion date. The plaintiff sued for additional costs incurred in appointing a new contractor to complete the project. The defendant counterclaimed for damages for wrongful termination of the contract, amount due under Interim Certificate No. 21, retention sum and value of materials on the project site.

Held (dismissing plaintiff's claim; allowing defendant's counterclaim with costs):

(1) The first EOT had nothing to do with the EOT of 189 days that was requested by the defendant on ground of the two variation orders given by the plaintiff. The request by the

defendant of an EOT of 189 days was not something within the contemplation of the parties when the first EOT of 90 days was given. Thus, the initial extension of 90 days should not be taken as a factor to be considered when deciding on whether to grant the EOT of 189 days as requested by the defendant. (paras 12 & 13)

(2) In relation to the store, there was some 90 days delay which was not caused by the defendant but attributed to the plaintiff as a result of the peculiar posture taken by the principal of the school. The request for an EOT of 90 days on account of this first variation order was reasonable in the circumstances of this case. The request for an EOT on account of a variation order was perfectly within the purview of cl. 43(f) of the contract. The request for an EOT arising from the second variation order was reasonable. Further, the piling works were critical and until that had been completed, no other works could commence. (paras 17, 22 & 23)

(3) The question of concurrent works that could be taken into consideration did not arise at all because the works had to progress sequentially from the construction of a temporary building, to building the store, which was not part of the contract, to the pupils moving over to the temporary building, to the demolition of the old building and then the commencement of the piling and load testing to the completion of the piling. (para 23)

(4) The plaintiff's refusal to grant the EOT was unconscionable, unreasonable and improper. When the superintending officer improperly refused to grant an EOT in a situation that would warrant an EOT, then time for completion was set at large (*Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd;* refd). Thus, the CPM would have to be amended accordingly to reflect the 189 days extension. Therefore, there was no delay, as at the point of termination, the defendant had some nine and a half months to go before completion. (paras 27, 28 & 37)

(5) Even if the plaintiff had reason to suspect the defendant's ability to complete the project without any EOT being given, its reasonable remedy would be to recover its losses based on the liquidated and agreed damages clause of RM650 for everyday of delay. That would be a more reasonable course

to pursue consistent with the plaintiff's duty to mitigate its loss. The costs of engaging a new contractor would certainly be much higher than allowing the current contractor to faithfully finish his work. There was no evidence that the defendant had slowed down the works or that it had stopped work altogether. The defendant had actually increased its workforce and the workers had been working overtime until 10pm and even on Sundays and public holidays. As such, the termination of the contract by the plaintiff on ground of the defendant failing to proceed "regularly and diligently with the works" was premature, unreasonable and wrong in law. (paras 49 & 50)

(6) Taking into consideration the percentage of the works completed and only a remaining 25% which was within the defendant's scope of work, the defendant could not be said to have committed a repudiation that went to the root of the contract by their actions such that the plaintiff was justified in terminating the contract on ground of anticipatory breach. Further, delay alone did not amount to repudiation unless coupled with an intention not to complete the project, which was not the case here. The plaintiff failed to prove that the defendant shall fail to meet the completion date. (paras 54 & 55)

(7) With regards to the interim claim No. 21, the defendant had proven the sum due for work done. The defendant had not proven its claim for materials left at the site. The retention sum should be allowed as there was no evidence of any defective work not already rectified by the defendant. As a consequence of the wrongful termination of the contract, the defendant was entitled to damages to be assessed for the damages that flowed naturally arising out of the plaintiff's breach of the contract. (para 56)

Case(s) referred to:

Chua Chay Lee & Ors v. Premier Properties Pte Ltd [2000] 4 SLR 177 ***(refd)***

Gasing Heights Sdn Bhd v. Pilecon Building Construction Sdn Bhd [2000] 2 CLJ 664 HC ***(refd)***

Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd [2007] 3 SLR 86 ***(refd)***

West Faulkner Associates v. London Borough of Newham [1994] 422 Con LR 144 ***(refd)***

Other source(s) referred to:

Chappell, Marshall, Powell-Smith and Cavender, *Building Contract Dictionary*, 3rd edn, pp 348-349

Sundra Rajoo, Dato' WSW Davidson and Ir Harbans Singh KS, *The PAM 2006 Standard Form of Building Contract, LexisNexis*, 2010, pp 553, 555, 556 & 557

For the plaintiff - Nur Irmawatie Daud; SFC
For the defendant - Mohd Asri Othman; M/s Nashir, Johal & Co

Reported by Amutha Suppayah

JUDGMENT

Lee Swee Seng JC:

[1] The plaintiff awarded to the defendant a contract to construct and complete two additional blocks of building for a school called Sekolah Kebangsaan Sungai Baharu, Kuala Kerian, Daerah Kuala Kerian, Perak ("the project"). The contract entered into was the standard form PWD 203 (Rev. 10/83) contract. The contract sum was for RM3,511,597. Under the contract the completion date was 26 October 2009 and site possession was given to the defendant on 10 June 2008. There was later a three-month extension given to the defendant, even without the defendant requesting for it, in view of the steep increase in price of the building materials and the shortage of building materials. It was an extension given as matter of course and across the board to all Bumiputra contractors during that time to alleviate their problems in the light of shortage of and rise in the costs of building materials generally. That extended the completion date to 25 January 2010.

Problem

[2] Everything went well at the beginning. The project involved the construction of a temporary building so that the pupils could move to it whilst the existing building was to be demolished and to make way for the construction in its place two new blocks of four-storey buildings. That temporary building was already ready on 13 October 2008 for the pupils to move in. However the headmaster refused to budge and allow the pupils to so move until a store had been built for the storage of the school's

paraphernalia. The store was not in the plan. The construction of such a store was, of course, not rocket science but nothing could be built until the plaintiff submitted the drawings to the defendant on 15 December 2008. The store was completed in January 2009 and the pupils moved to the temporary building in early February 2009. There were some three months delay which the defendant said was not their fault.

[3] After demolition, piling work commenced. The contract specified the piling for a depth of 36 metres. Load test was conducted after piling. The piling to a depth of 36 meters failed the load test. Fresh instruction had to be obtained and it came only on 8 April 2009 with fresh instruction for piling for a depth of 48 meters. The longer piles had to be specially ordered by the defendant for it involved an additional 144 piles. The additional piling work could only be done commencing 16 April 2009 and could only be completed on 4 June 2009. That was because after piling to the new depth, one has to allow for a month or so for settlement before any load test could be conducted. The new piling depth withstood the load test.

[4] The defendant requested in writing on 14 July 2009 and on 20 August 2009 for extension of time (EOT) of 189 days based on the above two unforeseen events in the construction of the store and in the piling to a new depth of 48 meters and the ensuing delay that had been occasioned, but received no response from the plaintiff.

[5] Meanwhile the defendant continued regularly and diligently with the construction to completion of the project. However the plaintiff did not think so, comparing the status of the project with the critical path method (CPM) submitted by the defendant before the commencement of the project. The defendant contended that the CPM could not be relied on as it has been overtaken by the two events that would justify an EOT.

[6] Be that as it may, the plaintiff after issuing three warning letters, proceeded to terminate the contract by a notice of termination dated 16 October 2009 on ground that the defendant had breached cl. 19(ii) of the contract in that it had failed to proceed regularly and diligently with the works.

[7] At the time of the termination of the contract by the plaintiff, the defendant had constructed the two new blocks up to the roof beam and still has three and half months to go before the completion date.

Prayers

[8] The plaintiff sued for the sum of RM721,449.15 being the additional costs incurred in appointing a new contractor to continue with and complete the project. Meanwhile the defendant counterclaimed for damages for wrongful termination of the contract as follows:

(a) The amount due under interim certificate No. 21 for RM265,637.32;

(b) Retention sum of RM125,540;

(c) Wrongful forfeiture of performance bond of RM309,148.41;

(d) Value of materials on the project site of RM87,766.90;

(e) Damages for breach of contract;

(f) Interest at 8% per annum from the date of breach of contract to realisation and

(g) Costs.

[9] The defendant, through its counsel, on the day of clarification and decision, withdrew the claim on the forfeiture of the performance bond and so that claim was struck out.

Principles

Whether The SO Should Have Granted The Request For EOT In The Circumstances Of The Case

[10] There was a previous EOT of 90 days given some time in February 2009. This extension was given across the board to all Bumiputra contractors because of the escalating costs of construction materials in particular steel and iron. As clarified by the parties on the date of clarification and decision, the EOT of 90 days was not requested by the defendant but was given as a matter of course. It was to alleviate the particular problem faced

by contractors because of the price hike. PW2, Mohd Fadzli bin Abdul Shukor admitted this in his testimony in court. He was the building engineer for the project. In his answer to question 25 of his witness statement WS P2 was as follows:

> The original completion date was 26 October 2009. However the contractor was given an EOT of 90 days because of an unusual escalation in price of building materials for Projects under RMK-9. Therefore the new completion date was on 24 January 2010.

[11] Indeed the certificate of delay and extension of time No. 1 dated 2 February 2009 at pp. 456-457 of Bundle B stated the reason for the EOT being the "Unusual escalation in the costs of building materials for projects under the RMK9 (Refer to Treasury Circular No. 3/2008) and citing cl. 43(j) of the contract which reads as follows:

> Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice of the causes of delay to the S.O. and if in the opinion of the S.O. the completion of the Works is likely to be delayed or has been delayed beyond the Date of Completion stated in the Appendix or beyond any extended Date for Completion previously fixed under this Condition: ...
>
> (j) by the Contractor's inability for reason beyond his control and which he could not reasonably have foreseen at the date of closing of tender of this Contract to secure such goods and/or materials as are essential to the proper carrying out of the Works, ..." (...)

[12] I agree with learned counsel for the defendant, Encik Mohd Asri bin Othman, that this EOT has nothing to do with the EOT of 189 days that was requested by the defendant on ground of the two variation orders given by the plaintiff. The first variation order (VO) is with respect to the construction of a store which the headmaster wanted before the pupils could be moved to the temporary building to allow for the old buildings to be demolished. The second VO was with respect to the fresh instruction in writing for piling to a depth of 48 metres instead of 36 metres for an extra 144 piles for which instruction in writing was only received on 8 April 2009. Going by the critical path method (CPM) submitted by the defendant which submission to the plaintiff was done before the two VOs were given, it would appear that the piling works should have been completed by 7 April 2009.

[13] The request by the defendant of an EOT of 189 days for the above reasons was not something within the contemplation of the parties when the first EOT of 90 days was given for a specific reason. Thus the initial extension of 90 days should not be taken as a factor to be considered when deciding on whether to grant to EOT of 189 days requested by the defendant.

[14] The temporary building was completed on 13 October 2008. The defendant duly informed the plaintiff about this by its letter of the same date at p. 3 of the defendant BOD Bundle F. The pupils could have moved into the temporary building to make way for the demolition of the old building but for the adamant refusal of the headmaster to allow the pupils to be so moved. The headmaster insisted on a store to be built to store the reading materials, sports equipment and its related paraphernalia. PW1, Encik Abdul Satar bin Muhammad, the Superintending Officer (SO), reluctantly admitted this under cross-examination. It was also admitted by the plaintiff that the construction of a store was not in the contract.

[15] Granted that there were some rectification works that were required to be done as minuted in minutes of the second site meeting dated 22 September 2008 but these had been completed by 13 October 2008 when the temporary building was handed over to the plaintiff by the defendant's letter of the same date at p. 3 of Bundle F. By the time of the third site meeting on 15 January 2009, it was already recorded that the temporary building had been completed and that the next development is the demolition of the existing old building. There was no site meeting in October, November and December 2008.

[16] With the headmaster stubbornly refusing to move the students until the store was built, there was a stalemate. Nothing could be done concurrently during this waiting period as the next stage in the works was the demolition of the old building which could not be done as the headmaster refused to move the pupils over to the temporary building. The headmaster only submitted the drawings on the store to JKR on 30 October 2008; see pp. 4-5 of the defendant's BOD Bundle F. It was not until 15 December 2008 that the plaintiff delivered to the defendant the new design for the construction of the store; see p. 6 of the defendant's BOD. It was only after that that the defendant could proceed with the construction of the store which was completed towards the end of January 2009 and the pupils moved into the temporary

A building in early February 2009. There was some 90 days delay not caused by the defendant but attributed to the plaintiff as a result of the peculiar posture taken by the principal of the school. The request for an EOT of 90 days on account of this first VO was reasonable in the circumstances of this case.

B

[17] The request for an EOT on account of a VO was perfectly within the purview of cl. 43(f) of the contract which provides as follows:

> C Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice of the causes of delay to the S.O. and if in the opinion of the S.O. the completion of the Works is likely to be delayed or has been delayed beyond the Date of Completion stated in the Appendix or beyond any extended Date for Completion previously D fixed under this Condition: ...
>
> (e) *by reason of the S.O.'s instructions issued under clause 5 hereof, provided that such instructions are not issued due to any default or breach of Contract by the Contractor or any sub-contractor nominated or otherwise, or*
>
> E
>
> **(f) by reason of the Contractor not having received in due time necessary instructions, drawings,** levels or instructions ... from the S.O due to any negligence or default of the S.O ...
>
> Then the S.O. shall so soon as he is able to estimate the length F of delay beyond the date or time aforesaid **make in writing a fair reasonable extension of time for completion of the Works ...** (emphasis added)

[18] I am not unaware of the fact that if concurrent work could G be done, then a request for EOT may not be favourably considered. The need to take into consideration concurrent delays in deciding whether an EOT should be given was explained in *Gasing Heights Sdn Bhd v. Pilecon Building Construction Sdn Bhd* [2000] 2 CLJ 664 as follows:

> H Further, in assessing EOT, the arbitrator is obliged to assess EOT in the same manner and in compliance with the same principles imposed upon the architect by the PAM Form, architectural practice and the law. The arbitrator cannot apply his personal methodology of assessing EOT and ignore the principles I countenanced by PAM Form, architectural practice and the law. The PAM Form and architectural practice requires the arbitrator to take into account *inter alia* the principle of "concurrent delays" when assessing EOT.

In assessing EOT, the assessor (architects and arbitrators alike) must take into account the issue of "concurrent delays". In "*Law and Practice of Construction Contract Claims*" 2nd edn by Chow Kok Fong, the writer said:

> "Concurrent delays" is an expression which describes a situation where there are two or more causes or delay operating at a particular point of time and at least one of these causes is outside the contractor's control. Consider the situation where a contractor, as a consequence of his own shortcomings, fail to keep with the progress of the works with the result that he could not begin an important activity on the start date stipulated in the construction programme.

[19] However PW2 under cross-examination confirmed that until the pupils had moved to the temporary building constructed, no other works could be done as the old building had first to be demolished.

[20] It was only after the pupils had moved to the temporary building that the demolition work on the existing building could commence. According to DW2, Mr Sia Chin Ling, the sub-contractor from Addaland Sdn Bhd who was the one who actually did the works, the piling works started on 12 February 2009. The plaintiff's instruction of 6 piles per point for load testing was complied with. Unfortunately it failed the load test. The plaintiff subsequently instructed the defendant to proceed for another 12 metres for the test pile which instruction only came on 8 April 2009. The new test piling to a depth of 48 metres was done commencing 16 April 2009, soon after receiving written instruction.

[21] It is true that under the CPM the piling should have been completed by 7 April 2009. However the piling up to 36 metres depth failed the load test. Fresh instruction came only on 8 April 2009 which is after the scheduled date. See instruction in writing at p. 133 of Bundle D. I have no good reason to disbelieve DW2 when he said that the 144 new piles for a depth of 48 metres had to be specifically ordered because they were not in the original contract. PW1 himself confirmed that after piling, the contractor would have to wait for about 28 days before the load testing could be done in compliance with approved engineering practice.

[22] The request for an EOT arising from the fresh instruction was reasonable. The justification for the EOT of 57 days for the additional piling to a depth of 48 metres as clearly set out in the defendant's first request for EOT in its letter to the plaintiff dated 14 July 2009 (p. 1 of Bundle D) was reasonable as calculated below:

(1) Additional quantity of pile from 36m to 48m = 12m/number X 144 = 1,728 metres (12 days).

(2) Time needed to purchase additional piles = 45 days from date Purchase Order is issued.

[23] PW2 also confirmed that the piling works are critical and until that had been completed, no other works could commenced. The question of concurrent works that could be taken into consideration does not arise at all for here the works had to progress sequentially from the construction of a temporary building, to building the store which was not part of the contract, to the pupils moving over to the temporary building, to the demolition of the old building and then the commencement of the piling and load testing to the completion of the piling.

[24] There was also a request for an EOT based on the condition of the project site as set out in the said letter of 7 April 2009. At p. 2 of Bundle D the defendant briefly stated the reasons justifying the various EOT as follows:

(1) The soft surface earth hampered the activities on the project site. The water level around the project site was always high causing the earth to be soft and slowing down the movement of the piling machine. The piling works were supposed to have been completed within 54 days but because of the soft earth condition, it required 65 days to complete instead, causing a delay of 11 days. The soft earth condition further made the installation of the "Frame" for the purpose of the load test, more challenging.

(2) The soft earth surface that was not anticipated had to be dug out and taken out of the site so as to replace it with imported dry earth. The wet surface earth delayed the piling by about six days.

(3) The project site that was narrow further slowed down any activity on it. Not all the piles could be sent at one go to the site for lack of space to store the piles. Piling works had to be completed in block A before it could be commenced for block B occasioning a delay of 25 days.

[25] PW1 admitted that the project site was very near to the sea and that contributed to the soft soil condition. He also admitted that because of the urgency of the construction, the plaintiff did not carry out any soil test of the project site before awarding the contract.

[26] The total number of days of the various heads of EOT as set out at p. 2 of Bundle D is 189. The reasons given are cogent and worthy of a careful consideration. However no reply was forthcoming and so a second letter dated 20 August 2009 (pp. 153-154 of Bundle D) was sent out. There was no reply from the plaintiff for both the first and second requests for EOT. At the same time the plaintiff refused to allow the defendant to amend the CPM to take into consideration the above factors set out in the defendant's letter of 14 July 2009 and 20 August 2009 though the defendant had expressly requested for a rescheduling of the CPM in both letters.

[27] The refusal and neglect of the plaintiff in granting the EOT requested by the defendant was, in the circumstance of the case, unconscionable, unreasonable and improper.

[28] When the SO improperly refused to grant an EOT in a situation that would warrant an EOT, then time for completion is set at large. As was held in the Singapore Court of Appeal case of *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR 86:

> [69] ... the concept of time being set at large is not at all alien to construction disputes. It is firmly established that, as mentioned above, **time may be set at large** due to acts of prevention where there is no contractual provision governing the situation or **where the architect fails to properly grant an extension of time under the contract**. See also, I N Duncan Wallace QC, *Hudson's Building and Engineering Contracts* (Sweet and Maxwell, 11th edn., 1995) vol. 2 at para. 10.040; Keith Pickavance, *Delay and Disruption in Construction Contracts* (Lloyd's of London Publishing Ltd, 3rd edn., 2005) at ch. 6... (emphasis added)

Whether The Plaintiff's Termination Of The Contract On The Ground That The Defendant Had Failed To Regularly And Diligently Proceeded With The Works Was Premature, Unreasonable And Wrong In The Circumstances Of The Case

[29] The notice specifying default and intended termination of the contract was dated 10 July 2009 at p. 12 of Bundle E. It appears to be founded on the ground that the contractor had failed to proceed regularly and diligently with the works as provided under cl. 51(a)(ii) of the contract. The clause reads:

> [51] Determination of Contractor's Employment
>
> (a) Without prejudice to any other rights or remedies which the Government may possess, if the Contractor shall make default in any one or more of the following respects, that is to say:
>
> …
>
> (ii) **if he fails to proceed regularly and diligently with the Works**, or …
>
> then the S.O. may give him a notice by registered post or by recorded delivery specifying the default, and if the Contractor shall either continue such default for fourteen (14) days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not), then the Government may thereupon by a notice sent by registered post or by recorded delivery determine the employment of the Contractor under this Contract. (emphasis added)

[30] The notice reads as follows in its original language:

> Dukacita diperhatikan bahawa tuan tidak menjalankan kerja dengan bersungguh-sungguh dan kerja tuan dijangka tidak dapat disiapkan pada Tarikh Siap Kerja yang telah ditentukan pada 24-01-2010. Kerja tuan sepatutnya sudah 52% siap tetapi kemajuan yang dicapai setakat ini adalah hanya 29%. …
>
> 3… Sekiranya tuan gagal mematuhi kehendak perenggan ini dalam tempoh 14 hari selepas penerimaan notis ini atau di dalam tempoh yang munasabah, pengambilan kerja tuan di bawah Kontrak ini akan ditamatkan sejajar dengan Fasal 51 Syarat-syarat Kontrak…

[31] As can be seen above, the said notice is premised on the plaintiff's perceived notion that the defendant had failed to proceed diligently with the works and so it is not likely that the defendant could finish the works by the completion date of 24 January 2010.

[32] This was followed by a notice of termination dated 16 October 2009 at p. 9 of Bundle E which in its original language reads as follows:

> 2. Dukacita diperhatikan bahawa tuan masih didapati tidak menjalankan kerja dengan bersungguh-sungguh and kerja tuan dijangka tidak dapat disiapkan pada tarikh siap kerja yang telah ditentukan pada 24/01/2010. Kerja tuan sepatutnya sudah 73.7% siap tetapi kemajuan yang dicapai setakat ini adalah hanya 57.3%. Kegagalan tuan itu masih berulang sungguhpun tuan telah diberi Notis Untuk Tujuan Penamatan Pengambilan Kerja Kontraktor seperti yang tersebut di atas.
>
> 3. Maka sejajar dengan Fasal 51 Syarat-syarat Kontrak, pengambilan kerja tuan adalah dengan ini DITAMATKAN.
>
> 4. Tuan hendaklah dengan serta-merta memberhentikan semua pekerjaaan di tempat kerja, memindahkan kakitangan dan pekerja dari Tapak Bina dan menyerahkan pemilikan Tapak Bina itu dengan meninggalkan semua bangunan sementara, loji, perkakas, kelengkapan, barang-barang dan bahan takpasang di Tapak Bina...

[33] The plaintiff contended that the defendant was not likely to complete the project in three and half months based on the history of its delay without taking into consideration the reasonable request of the defendant for EOT of 189 days. The defendant castigated this as a pure conjecture and speculation.

[34] The learned authors Sundra Rajoo, Dato' WSW Davidson and Ir Harbans Singh KS in *The PAM 2006 Standard Form of Building Contract*, LexisNexis, 2010 at p. 553 cautioned Employers who are too keen to invoke this ground in cl. 25.1(c) of the PAM 2006 Contract which is in *pari materia* with cl. 51(a)(ii) of the PWD 203 (Revised 10/83) Contract as follows:

> Although being in practice the most common ground of determination by the employer due to the contractor's progress being 'slow', it is nevertheless a difficult ground to establish and many a determination premised on it has been ultimately invalidated by the courts and arbitral forum with dire consequences. Therefore, practitioners must not be too hasty to invoke this performance default until they are confident that it can withstand the relevant legal challenges.

[35] In *West Faulkner Associates v. London Borough of Newham* [1994] 422 Con LR 144 it was held as follows:

> In the JCT contracts the phrase requiring the contractor 'to proceed regularly and diligently with the works' means that the contractor must proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of work. The clause requires the contractor to proceed both regularly and diligently. Failure in either respect entitles the employer to terminate the contract.

[36] The learned authors Chappell, Marshall, Powell-Smith and Cavender in *Building Contract Dictionary* (3rd edn.) at pp. 348-349 explained the meaning of the phrase 'regularly and diligently' as follows:

> ...This phrase probably means more than an express restatement of the contractor's common law obligation as to progress ie it must bear some relationship to the specified date of completion and his progress must be constant, systematic and industrious. Whether or not the contractual standard is achieved is probably best judged objectively having regard to such matters as:
>
> - The number of men retained on site compared to the number one would expect to be needed by a competent and experienced contractor faced with the same relevant commitments.
>
> - The plant and other equipment employed on the work in relation to the type and volume of work to be undertaken in the time available for completion.
>
> - The progress actually being made on the site relative to the volume and complexity of the work still to do to achieve contractual completion.
>
> A slow rate of progress judged against the performance of other contractors is an indicator that the contractor is not proceeding 'regularly and diligently' although low productivity on site may well be explained by other factors which are outside the contractor's control. Hence, account must also be taken of any extenuating circumstances that are outside the contractor's control which are hindering, or which may in due course hinder or prevent, the desired rate of progress.
>
> There is also at least one line of authority making it clear that merely going slowly is not, in itself a breach of contract and it will always be a difficult question to decide whether a contractor's progress amounts, in fact, to a failure to proceed regularly and

diligently. However, the Court of Appeal has now given some useful guidance on the matter. 'What particularly is supplied by the word "regularly": is not least a requirement to attend for work on a regular daily basis with sufficient in the way of men, materials and plant to have the physical capacity to progress the works substantially in accordance with the contractual obligations. What in particular the word "diligently" contributes to the concept is the need to apply that physical capacity industriously and efficiently towards the same end. Taken together, the obligation upon the contractor is essentially to proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of work': *West Faulkner Associates v. The London Borough of Newham* (1995) 11 Const LJ 157 per Simon Brown LJ at 161.

That view usefully expands on previous judicial opinion which acknowledges that whereas the words generally convey a sense of activity, of orderly progress, of industry and perseverance, 'such words provide little help on the question of how much activity, progress and so on is to be expected …': *London Borough of Hounslow v. Twickenham Garden Developments Ltd* (1970) 7 BLR 81 …

[37] Having found that the request for EOT of 189 days was reasonable and that the SO should have allowed it, the CPM would have to be amended accordingly to reflect the 189 days extension. The corrected and revised CPM should have added another 189 days for the soft soil condition and restriction in space at the project site besides the construction of the store and the piling to a new depth of 48 metres involving 144 piles. Therefore strictly speaking there was no delay, as at the point of termination, the defendant had some nine and a half months to go before completion!

[38] Assuming for a moment that the EOT of 189 days was validly and reasonably not granted, the defendant still had three and a half months to go before the completion date of 25 January 2010. The notice of termination for failure to proceed regularly and diligently with the works was dated 16 October 2009.

[39] This is a case where the plaintiff has been so fixated on the CPM as initially submitted by the defendant before the VOs were issued by the plaintiff that it had lost all focus and a sense of fairness bearing in mind the formidable challenge the defendant was confronted with in both the VOs.

[40] The CPM is nothing more than a guide with respect to the sequence and schedule of works and may be used as a guide in the SO exercising his discretion in whether or not to grant an EOT and if so for how many days. It is not part of the "contract documents" for the contract and sole reliance on it to evidence a failure of the defendant to proceed regularly and diligently with the works can be suspect and risky especially when the completion date is still not up. The plaintiff relying on it as a ground for terminating the contract before the completion date is up runs the risk that the termination has been hastily done and having no reasonable justification and worse still, being haunted later by a claim from the contractor that the termination has been unreasonable, invalid and wrong in law. Strong and cogent evidence must be presented by the employer for a termination on this ground when the contractor had already completed up to 57.3% of the works on the date of termination on 16 October 2009 with three and a half months to go.

[41] The importance and implication of non-compliance with the CPM must be kept in its proper perspective. As explained in *Roberts & Schaefer Co v. Hardaway Co*, a decision of the United States Court of Appeals for the Eleventh Circuit No. 97-2664 at p. 5:

> A CPM is a standard construction device used to plan the activities of a construction project in a logical, orderly sequencing manner citing durations for the different activities from the beginning of the job to the end. A CPM is created by dividing the entire project into discrete and quantifiable steps; in turn, each step is allotted an estimated time of completion. Ultimately, each step is arranged into a chronological sequence, thus revealing the anticipated length and structure of the entire construction schedule. In addition to serving as a road map for the contractors to determine when and where their work fits into the overall construction sequence, the CPM also assists contractors in assessing their hiring and material purchasing needs.

[42] In this respect it is opportune for me to quote once again from the learned authors Sundra Rajoo, Dato' WSW Davidson and Ir Harbans Singh KS in *The PAM 2006 Standard Form of Building Contract*, LexisNexis, 2010 at pp. 555-556 as follows in distilling the important matters with respect to termination on the ground of failure to proceed "regularly and diligently with the Works":

(a) the contractor's obligation under the contract is only to finish the works by the Completion Date as stipulated in the contract. Failure to abide by the Work Programme (as stated in Clause 3.5 to 3.7 inclusive of any revisions) is, *prima facie*, not a breach of contract *per se*, since such a document is in itself, pursuant to Clause 3.6 not part of the contract. *So long as the contractor completes the works by the Completion Date (including any extension under Clause 23.0), he is apparently not culpable of any default*; and

(b) since it is for the contractor to plan and undertake the works as he deems fit within the allocated contract period ..., *mere neglect or omission on his part to effect the same is not tantamount to a failure to proceed with due diligence and expedition provided, he eventually meets the stipulated Completion Date(s)* (see *Greater London Council v. Cleaveland Bridge & Engineering Co Ltd* (1986) 34 BLR 50); (emphasis added)

[43] There is the subjective element in determining whether one has proceeded "regularly and diligently with the works." Where there has been a gross and glaring delay that a contractor is guilty of, it may safely be said that the contractor has failed to regularly and diligently carry out the works and the employer need not have to wait until completion date to terminate the contract. In other words an employer should not have to endure the agonisingly slow pace of the contractor's progress in the works.

[44] However, here the defendant had already doubled its workforce and even working them in shifts up to 10pm at night to speed up the progress of the works. The workers were working on Sundays and Public Holidays as well. As can be seen the fresh instruction for the piling to 48 metres was received on 8 April 2009 and the piling was completed on 4 June 2009. The defendant had taken a mere four months to complete four floors up to the roof beam already when the contract was terminated. I can accept the evidence of DW2 that the construction of the floors needs to be in sequence and once that has been completed, several teams could work simultaneously and concurrently such that the progress thereafter could be faster. It was admitted that the M&E works do not come within the scope of the contract with the defendant but that another sub-contractor was involved.

[45] There seems to be three phases for the construction of the project as follows:

(i) First phase. Piling. Instruction to begin work to a new depth of 48 metres issued on 8 April 2009. Completed on 4 June 2009.

(ii) Second phase. Construction of four floors up to roof beam. Completed by 16 October 2009 when the notice of termination was issued.

(iii) Third phase. Other works in each floor. To be done concurrently on each floor by separate teams.

[46] DW2 explained that the most difficult part of the project was the structure as it must be done in sequence, floor by floor. The M&E works were assigned to another sub-contractor to do and it could be done concurrently with the other uncompleted works and estimated to be about 15% of the works. In fact the defendant had only 25% of the works to be completed in three and a half months. From the plaintiff's own submission at paras. 66-68, it can be seen that the defendant had progressed 28.1% in three and a half months from early July to mid-October 2009. There is merit in the defendant's rhetorical question raised that if the defendant had progressed 28.1% in three and a half months, there is every reason to be hopeful that it could complete the balance 25% within the same period!

[47] The written submission of the plaintiff's learned counsel SFC Puan Nur Irmawatie bt Daud is summarised below by the defendant's learned counsel Encik Mohd Asri to show the percentage increase in subsequent progress:

Plaintiff's submission	Date	% progress	% increase in subsequent progress
para. 66	3 July 2009	29.2%	-
para. 67	25 August 2009	40%	10.8%
para. 68	16 October 2009	57.3%	17.3%

[48] The observation by the learned authors Sundra Rajoo, Dato' WSW Davidson and Ir Harbans Singh KS in *The PAM 2006 Standard Form of Building Contract, LexisNexis*, 2010 at pp. 556-557 would be apposite:

Before the employer can invoke his right under the instant ground, it is imperative for him to have monitored the contractor's performance as part of the progress monitoring process and established the default with reasonable precision backed up with reliable evidence such as site records, work reports, progress reports, etc. Here, heed should be taken of the following advice preferred by D Chappell in the *Parris's Standard Form of Building Contract*: JCT98 (3rd edn.) where at page 263 he says:

> To show failure, the Contractor must be failing in his duty to work constantly, systematically and industriously. The architect must look into the labour on site compared to the labour which ought to be there, the plant and equipment in use, *the work to be done, the time left to complete the works, the rate of progress, whether the contract is likely to finish on time and, if not whether the delay is due to factors beyond his control* …

Therefore, in short, using merely the failure of the contractor to abide by his Work Programme (or its update) as a yardstick to establish the default *per se*, is insufficient. For the determination to be tenable on this ground, the ingredients to prove failure to proceed 'regularly and diligently' are much wider as can be gleaned from the foregoing commentary. For the contractor to challenge any determination premised on the instant default, it is incumbent for him to further his argument on denying that he has in fact failed to proceed 'regularly and diligently' with his Works as alleged. Here too, documentary evidence involving the various records, reports, etc are equally relevant... (emphasis added)

[49] Even if the plaintiff has reason to suspect the defendant's ability to complete the project without any EOT being given, its reasonable remedy would be to recover its losses based on the liquidated and agreed damages (LAD) clause of RM650 for everyday of delay. Assuming that there is a delay of 90 days that would work out to be RM58,500. That would be a more reasonable course to pursue consistent with the plaintiff's duty to mitigate its loss. The costs of engaging a new contractor would certainly be much higher than allowing the current contractor to faithfully finish his work. Here there was no evidence that the defendant had slowed down the works or that it had stopped work altogether. The opposite is true with the defendant's evidence that it had increased its workforce and that the workers had been working overtime until 10pm and even on Sundays and Public Holidays.

[50] Under the circumstance, the termination of the contract by the plaintiff on ground of the defendant failing to proceed "regularly and diligently with the works" was premature, unreasonable and wrong in law.

Whether There Has Been Anticipatory Breach On The Part Of The Defendant Such That The Plaintiff Was Justified In Terminating The Contract

[51] The contract itself provides for an LAD clause of RM650 for every day of delay. In other words parties have anticipated that in the event of a delay, that would be the measure of the loss suffered by the plaintiff and the LAD would also serve as an incentive for the defendant not to cause any further delay. The LAD clause here would be superfluous if the plaintiff can terminate the contract even when there is still three and a half months more to go before completion date assuming that the SO has been justified in not granting the EOT requested by the defendant. In fact at the point of termination the defendant had already overcome the main obstacles of the obstruction caused by the headmaster in insisting on the store to be built first before the pupils may moved to the temporary building and the piling had been done to a new depth of 48 metres and in fact the building was up to the roof beam already. The defendant had in overcoming the obstacles found a new momentum and was managing the progress well with its workers working overtime until 10pm. Even if one accepts what was minuted at the fifth site meeting minutes (p. 523 of Bundle B) that the defendant indicated that it could only complete by 31 March 2010, that would only be a delay of slightly over two months. I can accept the evidence of DW2 that the date of 31 March 2010 was a very conservative estimate on the pain of LAD and that he was hopeful of completing the project within the completion date. It was also minuted that that the defendant had 31 workers at site working on the project. Taking into consideration the percentage of the works completed and only a remaining 25% which is within the defendant's scope of work, the defendant could not be said to have committed a repudiation that went to the root of the contract by their actions such that the plaintiff was justified in terminating the contract on ground of anticipatory breach. Under

not too dissimilar a factual matrix, the Singapore Court of Appeal in *Chua Chay Lee & Ors v. Premier Properties Pte Ltd* [2000] 4 SLR 177 observed as follows:

> [24] Although there are different ways of expressing the test for repudiation, they are not inconsistent with one another. In *The Nanfri; Federal Commerce & Navigation Co Ltd v. Molena Alpha Inc & Ors* [1979] AC 757, 779, Lord Wilberforce aptly observed, after referring to a number of these formulations, that the various formulations by the authorities as to when a breach amounts to a repudiation 'represent, in other words, applications to different contracts of the common principle that, **to amount to repudiation a breach must go to the root of the contract**.'
>
> [25] In this case, the learned judicial commissioner applied the right test for the purpose of determining whether or not the respondents had repudiated the contract. Relying on *Universal Cargo Carriers Corp v. Citati* [1957] 2 QB 401, His Honour examined all the circumstances surrounding the agreement before **he concluded that the respondents had not repudiated the agreement by delaying the completion of the appellants' apartments by 12 months**. It is worth remembering that in *Universal Cargo Carriers Corp v. Citati* [1957] 2 QB 401, 435, Devlin J reiterated that while the application of the doctrine of frustration is a matter of law, the assessment of a period of delay sufficient to constitute frustration is a question of fact. It is trite law that the finding of fact of the trial judge is not to be lightly interfered with.
>
> [26] The learned judicial commissioner furnished a number of reasons for finding that the respondents had not repudiated the agreement. The appellants have tried to attack some of his reasons. One need not agree with each and every reason given by the learned judicial commissioner. What is important is that if one were to ask whether or not the respondents' delay of around 12 months for the handing over of the appellants' new apartments is an anticipatory breach which goes to the root of the contract or is a frustrating delay or will lead to performance by the respondents of their contractual obligations in a manner which is substantially inconsistent with the bargain between them and the appellants, there is no reason whatsoever to disturb the finding of the learned judicial commissioner.
>
> [27] There is no doubt that the respondents had been rather tardy in performing their contractual obligations. The appellants have certainly good reason to be unhappy with the delay. However, whatever grouses the appellants may have had in the

past, **things had finally begun to move along by 11 May 1999, the day they purported to terminate the agreement**. Whether or not the project site was then lush with overgrown vegetation and whatever the newspapers may have reported about the financial standing of the respondents, the main contractor for the housing project had been appointed by the respondents. More importantly, the main contractors were, as has been mentioned, obliged to complete Phase 1 of the project, which includes the appellants' new apartments, by 21 July 2000, **failing which they would have to pay liquidated damages of $10,000 per day, a rather stiff sum**. The appellants had been invited on 22 April 1999 to select their housing units on 8 May 1999. Whatever the respondents' brochure may have said about the completion date for the project, the appellants had been informed that there would be a delay of around one year in the handing over of the new apartments to them.

[28] *The inclusion of a liquidated damages clause in the agreement shows that the parties had contemplated a possible delay in the completion of the appellants' apartments and had provided for the consequences of delay in the agreement*. In this case, the amount payable per annum by the respondents to the appellants for the delayed handing over of the apartments, namely $280, 500, is not to be scoffed at. The learned judicial commissioner understandably paid much attention to the liquidated damages clause.

[29] The appellants attempted to downplay the importance of the liquidated damages clause in a number of ineffective ways. To begin with, they contended that notwithstanding the presence of the liquidated damages clause, one must take into account the fact that the respondents' primary obligation was to hand over the completed apartments to them by 28 August 1999. They submitted that as the respondents failed to comply with this primary obligation, they were entitled to terminate the agreement. However, the primary obligation of the respondents under the agreement must be determined in the light of all its provisions. *If the appellants are entitled to terminate the agreement as soon as it becomes obvious that the 28 August 1999 deadline cannot be met, the liquidated damages clause would be superfluous*. (emphasis added)

[52] There would of course be circumstances where it is nigh impossible for the contractor to complete the contract within the completion date or even way past the completion date. By no means am I suggesting that the contractor can buy time for themselves and insulate themselves against any termination on

account of delay by insisting that the LAD can always be invoked. The Singapore Court of Appeal hastened to clarify as follows lest this preconceived and misconceived notion should be allowed to prevail:

> [35] The sensible way of interpreting the agreement is that the target date for handing over the new apartments is 28 August 1999 but if there is any delay which does not go to the root of the contract, the appellants must be compensated with damages at the rate of 10 per cent per annum on the agreed sum in the banker's guarantee. *As for the appellants' concern that the respondents are not entitled to buy time for themselves for the purpose of delaying the project, we agree that the respondents are not entitled to assume that they can continue to delay the project indefinitely merely because they are prepared to pay liquidated damages*. In *Universal Cargo Carriers* [1957] 2 QB 401, 430, Devlin J issued a timely reminder that 'a party to a contract may not purchase indefinite delay by paying damages'. *A time will come when the delay is so great that the defaulting party is guilty of repudiatory conduct. That point of time had not arrived when the appellants terminated the contract on 11 May 1999*. As such, the learned judicial commissioner's findings should not be disturbed. (emphasis added)

[53] Likewise in the present case, that point in time had not arrived when the notice of termination was issued on 26 October 2009. Having overcome the obstacles, things were really beginning to move smoothly. The floors having been completed, the path was clear for the other works to be done concurrently whether it be M&E works or plumbing and water reticulation works.

[54] Delay alone did not amount to repudiation unless coupled with an intention not to complete the Project which was not the case here. See the case of *Soh Beng Tee & Co Pte Ltd* (*supra*).

[55] The plaintiff has failed to prove on a balance of probabilities that the defendant shall fail to meet the completion date. Even if that failure is probable, there is no good reason why the plaintiff should not be mitigating its loss by invoking the LAD clause against the defendant.

Whether The Defendant Has Proved The Various Heads Of Its Counterclaim

[56] The defendant submitted an interim claim No. 21 (Final) for the sum of RM265,637.32 for work done but not paid before the termination of the contract by the plaintiff. The defendant had produced at the trial the acknowledged copy of the said interim

claim No. 21 which unacknowledged copy was found at p. 7 of Bundle F. The acknowledgement was dated 30 October 2009 with the rubber-stamp of Jurutera Daerah JKR, Kerian. The plaintiff's learned counsel did not ask to recall PW1 who had denied that the plaintiff ever received the interim claim No. 21. The details of the breakdown of the work done appear at pp. 8-119 of Bundle F. In the absence of evidence from the plaintiff to rebut what had been submitted and in the absence of a joint-inspection and survey by the plaintiff upon termination of the contract by the plaintiff, I would hold that on a balance of probabilities the defendant had proved the said sum due for work done.

[57] Upon the issuance of the notice of termination dated 16 October 2009, the project site was sealed and as required by the said notice, the defendant was required to yield up possession of the site to the plaintiff and to leave behind all temporary buildings, plant, tools, equipment, goods and unfixed material. The defendant claimed a sum of RM87,766.90 for the materials left at the site when it was sealed after the termination of the contract. The details appear at pp. 122-142 of Bundle F. They included scaffolding (RM39,897), steel bars (RM39,897), door frames (RM10,644.90), Kalsa bricks (RM2,200) and cement (RM658).

[58] There is no evidence to show that these had been brought into the site or that they were ordered for this project. It is more than probable that whatever the defendant had brought onto the site had already been paid for by the plaintiff in certificate of interim payment No. 20 dated 29 September 2009 at p. 22 of Bundle D. The purchase orders, delivery orders and invoices exhibited by the defendant to try to substantiate its claims were all dated before the date of the certificate of interim payment No. 20 dated 29 September 2009. The said certificate reads:

BUTIR-BUTIR BAYARAN DAN POTONGAN

1. TARIKH PENILAIAN: 29-09-2009

2. NILAI KERJA DILAKSANAKAN DAN AMAUN-AMAUN LAIN YANG KENA DIBAYAR RM1,715,408.98

[59] It is more likely than not that all the materials brought into the site had been paid for according to this certificate of interim payment as is the testimony of PW1. There was also no police

report lodged by the defendant that the plaintiff had wrongfully converted to its own use the defendant's materials left at the site when the site was sealed off and the defendant had to yield up its possession to the plaintiff. I find that on a balance of probabilities the defendant had not proved its claim of RM87,766.90 for materials left at the site.

[60] The retention sum claimed of RM125,540 should be allowed as there is no evidence of any defective work not already rectified by the defendant and at any rate, as it is a finding of this court that the contract had been wrongfully terminated, this sum should be refunded to the defendant.

[61] As a consequence of the wrongful termination of the contract, the defendant is entitled to damages to be assessed by the SAR for the damages that flowed naturally arising out of the plaintiff's breach of the contract in wrongfully terminated it with respect to the losses it had suffered from being prevented from completing the contract.

Pronouncement

[62] In the circumstance, having held that the termination of the contract was premature, unreasonable and wrong in law, I had dismissed the plaintiff's claim.

[63] As a corollary, I had allowed the defendant's counterclaim for the following:

(a) Claim based on interim certificate No. 21 (Final) of RM265,637.32;

(b) Refund of retention sum of RM125,540;

(c) Damages to be assessed by the SAR for the plaintiff's breach of the contract;

(d) Interest on the above claims shall be at 4% per annum from the date of termination ie, 16 October 2009 to date of realisation.

[64] I had also allowed costs of RM20,000 to be paid by the plaintiff to the defendant.